



# STATE OF INDIANA

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March 5, 2009

DeAnna Brunner  
Chief Counsel and Administrative Officer  
Indiana State Department of Agriculture  
101 West Ohio Street; Suite 1200  
Indianapolis, Indiana 46204

*Re: Informal inquiry 09-INF-3*

Dear Ms. Brunner:

This is in response to your informal inquiry dated January 29, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write on behalf of the Indiana State Department of Agriculture ("Department"). Pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3), the Department is a public agency. I.C. § 5-14-3-2(m)(1). Your inquiry is whether notes from a grain audit may be disclosed and, if they are not generally disclosable, whether a judicial order can come from an administrative law judge or must come from a trial or appellate court judge.

Ind. Code § 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. I.C. § 5-14-3-4(a)(1) provides that an agency may not disclose any record declared confidential by state statute unless access is specifically required by a state or federal statute or is ordered by a court under the rules of discovery.

At issue here are grain audit notes which opposing counsel in an administrative appeal has requested. The ISDA is concerned that disclosing the records may violate I.C. § 26-3-7-6.5, which addresses disclosure of records under the Grain Buyers and Warehouse Licensing and Bonding Law. The statute provides the following:

Unless in accordance with a judicial order, the director, the agency, its counsel, auditors, or its other employees or agents shall not divulge any information disclosed by the applications or reports filed or inspections performed under the provisions of this chapter, except to agents and employees of the agency or to any other legal representative of the state or federal government otherwise empowered to see or review the

information. The director may disclose the information only in the form of an information summary or profile, or statistical study based upon data provided with respect to more than one (1) warehouse, grain buyer, or buyer-warehouse that does not identify the warehouse, grain buyer, or buyer-warehouse to which the information applies.  
I.C. § 26-3-7-6.5.

The records about which the ISDA is concerned are grain audit notes. According to the ISDA website ([www.in.gov/isda](http://www.in.gov/isda)), the staff of the Indiana Grain Buyers and Warehouse Licensing Agency (“IGBWLA”) “license and monitor the grain banks, grain buyers and warehouses for compliance to state statutes. Field auditors perform random, unannounced audits which may include audits for IGIC and SPARC.” These audits are conducted pursuant to I.C. 26-3-7. It is my understanding a “grain audit” is an “inspection” performed under the provisions of I.C. 26-3-7. Pursuant to I.C. § 26-3-7-6.5, then, the ISDA may not disclose those notes or other information from a grain audit absent a judicial order.

The other question you present is whether a “judicial order” as contemplated in I.C. § 26-3-7-6.5 can come from an administrative law judge or whether it must come from a trial or appellate court judge. Adjudicative proceedings, as well as the powers and duties of administrative law judges, are governed by I.C. 4-21.5-3:

**Administrative orders; enforcement**

Sec. 22. (a) The administrative law judge at the request of any party or an agency shall, and upon the administrative law judge's own motion may, issue:

- (1) subpoenas;
- (2) discovery orders; and
- (3) protective orders;

in accordance with the rules of procedure governing discovery, depositions, and subpoenas in civil actions in the courts.

(b) The party seeking the order shall serve the order in accordance with these rules of procedure. If ordered by the administrative law judge, the sheriff in the county in which the order is to be served shall serve the subpoena, discovery order, or protective order.

(c) Subpoenas and orders issued under this section may be enforced under IC 4-21.5-6.

I.C. § 4-21.5-3-22.

Further, Ind. Trial Rule 28(F) provides, “[w]henever an adjudicatory hearing, including any hearing in any proceeding subject to judicial review, is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure.”

Based on the foregoing, it is my opinion that an order from the administrative law judge requiring disclosure of the grain audit notes is a “judicial order” for the purposes of I.C. § 26-3-7-6.5.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,

A handwritten signature in cursive script that reads "Heather Willis Neal".

Heather Willis Neal  
Public Access Counselor